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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EMILIO GUZMAN-GARCIA, Defendant and Appellant.	A154054 (Sonoma County Super. Ct. No. SCR680729)

Emilio Guzman-Garcia appeals from a judgment of conviction and sentence imposed after a jury found him guilty of perpetrating multiple sex acts upon children. He contends there was no substantial evidence of force, duress, or fear required for his convictions under Penal Code section 288, subdivision (b)(1),[1] that he is entitled to one additional day of custody credit, and that the abstract of judgment should be corrected to indicate that his credits are not limited to one count. We will modify the judgment to award him one additional day of custody credit and, as so modified, affirm the judgment. We will further order that the abstract of judgment be corrected.

I. FACTS AND PROCEDURAL HISTORY

An information charged appellant with a lewd act upon a child under the age of 14 years (§ 288, subd. (a)), perpetrated on Jane Doe 2 (count 1) and Jane Doe 1 (counts 6–9). It further charged him with an aggravated lewd act upon a child under the age of 14

[1] All statutory references hereafter are to the Penal Code.

years (Jane Doe 1) by use of force, violence, duress, menace or threats (§ 288, subd. (b)(1), counts 2–5). The matter proceeded to a jury trial.

A. Evidence at Trial

1. Count 1, Jane Doe 2

Because this appeal does not address appellant's conviction on this count, we summarize the evidence only briefly as to Jane Doe 2.

Appellant was a ranch hand employed by Yvonne Spencer in 2007–2008. Spencer's granddaughter, Jane Doe 2, visited on weekends during that period, when she was less than ten years old. According to Jane Doe 2's testimony, one day at the ranch appellant picked her up and, while she sat on his lap, he licked her neck. Jane Doe 2 jumped off his lap and ran out. She was very scared by the incident and refused to return to the ranch until she heard that appellant no longer worked there. Months after the assault, she reported the incident to her mother. According to Jane Doe 2's mother, Jane Doe 2 said appellant had "licked up the side of her neck and face" and she became "really scared," ran into the house, and took a shower. While in the tenth grade, Jane Doe 2 told a counselor about the assault; law enforcement closed the case because Jane Doe 2 did not want to pursue it at the time due to the stress it caused.

2. Counts 2–9: Jane Doe 1

Jane Doe 1 testified that she was visiting the horses at the San Antonio Stables when she was 12 years old. Appellant, who worked at the stables, said she was "beautiful," put his arms around her, and tapped her butt. He then took her for a ride on a cart, with Jane Doe 1 seated next to him and her little sister and another girl (Shayla) riding in the back.

After a couple of minutes on the ride, appellant touched Jane Doe 1's thigh, ran his hands up her thigh, and touched her vagina outside her pants, which made her feel "really uncomfortable." He did this four or five times. Appellant asked Jane Doe 1 whether she had a boyfriend, whether she had ever kissed a boy, whether she knew how to kiss a boy, and if she was "ready to do anything new." Jane Doe 1 responded "no" to his questions. Appellant put his hands under Jane Doe 1's shirt and grabbed her bra and

breast; when she asked what he was doing, he replied that she had a "very nice stomach." Jane Doe 1 was scared of appellant and feared he was going to commit an act that was "not safe."

As appellant drove on, he grabbed Jane Doe 1's hand and placed it on his pants on top of his penis. Jane Doe 1 felt appellant's penis and was "really uncomfortable and disgusted." She pulled her hand away, pretended to point to something outside the cart to Shayla, returned her hand to her lap, and tried to "move away" from appellant. But appellant grabbed Jane Doe 1 by her thigh and pulled her closer to him, and grabbed her hand and placed it back on his pants over his penis. This cycle occurred four or five times. Jane Doe 1 could tell appellant had a "boner," and she felt "frozen."

Kathy Samoun, who boarded horses at the stables, had brought Jane Doe 1, Jane Doe 1's little sister, and Samoun's daughter Shayla to the stables to visit the horses. Samoun testified that appellant invited the group to see his horse, and at least twice told Jane Doe 1 that she was beautiful and twice asked Jane Doe 1 whether she had a boyfriend.

She later saw Jane Doe 1, Shayla, and Jane Doe 1's sister later riding in a cart that appellant was driving. Jane Doe 1 was sitting on the bench seat next to appellant, while the other girls rode on the back of the cart. When they returned, Jane Doe 1 jumped off the cart and approached Samoun. She was scared, began to cry, and reported that appellant had touched her. Specifically, Jane Doe 1 said that appellant had put his hand up her shirt, touched her privates, rubbed her leg, rubbed her stomach, said she had a nice stomach, placed her hand onto his "privates," and asked Jane Doe 1 if she had a boyfriend and if she was "ready to do stuff." Samoun confronted appellant, who claimed it was a "misunderstanding" and asked her not to call the police.

Trina Rushing, who boarded horses at the stables, testified that she saw appellant arguing with a woman in the barn, claiming that he did not touch the girl but only put his arm parallel to the ground to keep her from falling forward in the cart. The girl became teary-eyed and said, " 'No, you did not. You put your hand under my blouse. You touched my breast and you told me I had a nice stomach.' "

Shayla testified that, during the ride on the cart, Jane Doe 1 came to the back of the cart and told her that appellant had touched her "like up" her shirt, on her leg, and on places that she did not like.

Sergeant Gary Lawson testified that Jane Doe 1 was "pretty small" for a 12-year-old, "maybe" five feet tall and less than 100 pounds.

3. Defense Case

As to count 1, appellant denied licking Jane Doe 2's neck. As to the counts regarding Jane Doe 1, appellant claimed he drove the cart up the hill with the three girls riding on the front seat, and as he drove them back down the hill to the barn, he just put his right arm parallel to the ground to keep the girls from lurching forward. He did not recall patting Jane Doe 1 on the butt; he denied putting his arm around her, telling her she was beautiful, or asking her if she had a boyfriend; and he denied that Jane Doe 1 ever touched his penis. Appellant testified that he is 5 feet 8 inches tall and weighs 194 pounds.

B. Jury Verdict and Sentence

The jury found appellant guilty as charged. The court sentenced appellant to state prison for a total of 26 years.

This appeal followed.

II. DISCUSSION

A. Substantial Evidence Supporting Counts 2–5

Subdivision (a) of section 288 punishes any person "who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." Section 288, subdivision (b)(1)—charged here in counts 2 through 5—punishes any person "who commits an act described in subdivision (a) by use of *force, violence, duress, menace, or fear* of immediate and unlawful bodily injury on the victim or another person." (Italics added.)

At trial, the prosecutor informed the jury that counts 2 through 5 pertained to appellant grabbing Jane Doe 1's hand and placing it on his penis over his clothing multiple times, and argued that appellant committed these acts with the use of force, duress, and fear. Appellant now contends the evidence of force, duress, and fear was insufficient, so his convictions on those counts must be reversed or reduced to the lesser included offense of a nonforcible lewd act (§ 288, subd. (a)). We disagree.

Substantial evidence supports the conclusion that appellant perpetrated lewd acts on Jane Doe 1 by use of force. The force required under section 288, subdivision (b)(1) is physical force that is "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474; *People v. Griffin* (2004) 33 Cal.4th 1015, 1026; CALCRIM No. 1111.)

Here, appellant grabbed Jane Doe 1's hand and put it on his pants on top of his penis, four or five times. When Jane Doe 1 tried to move away from him, he grabbed her thigh, pulled her closer, and grabbed her hand and put it back on his penis. This is plainly force substantially different from and greater than the force needed to accomplish the lewd act itself. (*People v. Babcock* (1993) 14 Cal.App.4th 383, 386–387 [sufficient evidence of force where defendant placed his victims' hands on his crotch; when one of the victims resisted by pulling her hand away, the defendant put it back].)

Substantial evidence also supports the conclusion that appellant perpetrated lewd acts on Jane Doe 1 by use of duress. Duress, in this context, means a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed, or acquiesce in an act to which the victim otherwise would not have acquiesced. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.) In determining whether there was duress, the total circumstances are considered, including the relative ages and sizes of the victim and defendant, their relationship, whether the defendant threatened the victim or family with harm, and whether the defendant physically controlled the victim when the victim attempted to resist. (*Id*. at pp. 13–14; *People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

Here, the totality of the circumstances indicates an implied threat of force or danger that induced Jane Doe 1 to touch appellant's penis outside his clothing. Appellant was an adult, in a position of authority as a stables employee and the driver of the cart in which Jane Doe 1 was a passenger; Jane Doe 1 was just a 12-year-old girl. Appellant stood 5'8" and weighed 194 pounds; Jane Doe 1 was perhaps five feet tall and weighed about half as much—less than 100 pounds. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 47–48, 51 [sufficient evidence of duress where victim was eight years old, the disparity in size between her and the defendant contributed to her physical vulnerability, the defendant was a stranger, and the encounter was in a fairly isolated location].) Appellant had already touched Jane Doe 1's vagina on top of her clothing and, despite her saying she did not want to do anything "new," put his hands under her shirt and fondled her breasts, scaring her. The force associated with these earlier acts and circumstances was sufficient to suggest an implied threat to comply and to show that defendant accomplished all the acts by duress. (*Id*. at p. 48; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004–1005 [duress present where defendant took advantage of his psychological dominance as an adult authority figure and physical dominance in cornering his nine-year-old victim and holding her arm while touching her breasts and vagina].)

Finally, substantial evidence supported the conclusion that appellant perpetrated lewd acts on Jane Doe 1 by the use of fear. A lewd act is accomplished by fear if the victim is actually and reasonably afraid, or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it. (CALCRIM No. 1111.)

Here, ample evidence indicated that appellant perpetrated counts 2–5 by using the fear that he had engendered by perpetrating upon her counts 6–9. Before appellant put Jane Doe 1's hand on top of his penis, he had touched her vagina over her pants four to five times, asked if she was "ready to do anything new," and put his hand under her shirt and grabbed her bra and breast, scaring her and making her feel very uncomfortable and afraid he was going to perpetrate an act that was "not safe." It is reasonable to conclude that Jane Doe 1 was actually and reasonably afraid of immediate and unlawful bodily

injury, and that appellant took advantage of this fear to perpetrate counts 2–5. Appellant fails to establish error.

B. Credits

The court awarded appellant 682 actual days of credit, plus 102 days pursuant to section 2933.1, for a total of 784 days of credit for time served. Appellant contends he should have been awarded 683 actual days, instead of 682, for the time from his arrest on April 23, 2016 through his sentencing on March 6, 2018.

Under section 2900.5, appellant is entitled to credit for all the days he spent in presentence custody on the current charges. (*In re Watson* (1977) 19 Cal.3d 646, 652–654.) "Calculation of custody credit begins on the day of arrest and continues through the day of sentencing." (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) When the end date is included in the calculation, the number of days from April 23, 2016 to and including March 6, 2018 is 683 days. We will order modification of the judgment to reflect 683 actual days of credit, for a total (including the section 2933.1 credits) of 785 days of credit.

C. Abstract of Judgment

At sentencing, the probation department recommended credits as to count 2 and asserted, "No credits for the other counts since the sentence was consecutive." The abstract contains the notation, "CTS as to Ct. 2 only."

Appellant argues that there is no statutory basis for limiting credits only to count 2, since his pretrial custody was attributable to all counts. Respondent joins appellant's request that the abstract be modified to eliminate reference to credits being attached to count 2. Based on the stipulation of the parties, we will order appellant's proposed modification.

III. DISPOSITION

The judgment is modified to reflect 683 actual days credit (Pen. Code, § 2900.5) and 785 total days credit for time served; as so modified, the judgment is affirmed. The matter is remanded for modification of the abstract of judgment to eliminate the reference to credits being attached to count 2 only, by deleting the words, "CTS as to Ct. 2 only."

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.

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